Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ROSS YORDY CONSTRUCTION CO., INC.,
an Illinois Corporation and ROSS YORDY,

Petitioners,

vs.

SAMUEL NAYLOR, VI, in his individual capacity,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must the State created "status" required to be altered or eliminated incident to the publication of defamatory statements for there to be a deprivation of reputational liberty subject to due process protection under *Paul v. Davis*, 424 U.S. 693 (1986), rise to the threshold of a "legitimate claim of entitlement" as defined in *Board of Regents v. Roth*, 408 U.S. 564 (1972)?

2. Is a public prosecutor absolutely immune from suit under 42 USC §1983, for publicly announcing the dismissal of criminal charges against the perpetrator of a criminal offense for reasons defamatory of the victim of the offense because the prosecutor is absolutely immune for the act of dismissal itself?

PARTIES IN THE COURT BELOW

Petitioners, Ross Yordy Construction Company, Inc. and Ross Yordy were the Plaintiffs-Appellants in the court below. Respondent Samuel Naylor, VI, in his individual capacity, was the Defendant-Appellee below.

RULE 29.1 STATEMENT

Ross Yordy Construction Company, Inc. is an Illinois corporation. It has no parent or subsidiary corporations.

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On Petition For Writ Of Certiorari
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For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Ross Yordy Construction Company, Inc. and Ross Yordy respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming dismissal of Petitioners' complaint by the United States District Court for the Central District of Illinois, Peoria Division (Mihm, C.J.).

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-7a) is reported at 55 F.3d 285. The opinions and order of the district court (Mihm, C.J.) (App. B, *infra*, 8a-18a), are not reported.

JURISDICTION

The judgment of the court of appeals was entered May 23, 1995, (App. C., *infra*, 19a). This petition for certiorari is being brought within 90 days of that judgment as Petitioners did not seek rehearing in the court of appeals. Petitioners invoke this court's jurisdiction under 28 USC §1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

A. United States Constitution, Amendment XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

B. 730 ILCS 5/5-5-6.

"In All Convictions For Offenses In Violation of The Criminal Code Of 1961 Committed Against Any Person 65 Years Of Age O. Older In Which The Person Received Any Injury To Their Person Or Damage To Their Real Or Personal Property As A Result Of The Criminal Act Of The Defendant, The Court Shall Order Restitution As Provided In This Section. In all other cases, the court shall at the sentence hearing determine whether restitution is an appropriate sentence to be imposed on each defendant convicted of an offense. If the court determines that an order directing the offender to make restitution is appropriate, the offender may be sentenced to make restitution which shall be determined by the court."

C. 42 USC §1983.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

STATEMENT OF THE CASE

Petitioners, Ross Yordy Construction Company, Inc. and Ross Yordy sued Respondent Samuel Naylor, VI, State's Attorney for Hancock County, Illinois under 42 USC §1983. They invoked the district court's jurisdiction under 28 USC §§1331 and 1343. Petitioners alleged that Naylor's dismissal of a criminal prosecution against a former employee of Petitioners who had been indicted for theft of Petitioners' funds for the false reason announced at a press conference that Petitioner Ross Yordy, the sole stockholder for Ross Yordy construction Company, Inc., was "untruthful" and had "lied" to the prosecutor deprived Petitioners their status under Illinois law as the victims of a charged criminal offense incident to defaming petitioner Ross Yordy. Petitioners alleged that by being deprived of their status as the victims of a charged criminal offense, they were denied eligibility for consideration for an order of restitution by the Illinois Circuit Court pursuant to 730 ILCS 5/5-5-6 in the vent the former employee had been convicted of the theft and thereby deprived Petitioners liberty without due process of law.

The district court dismissed Petitioners' complaint under Rule 12(b)(6) Fed.R.Civ.P. The court of appeals affirmed. The court of appeals held that the Illinois Statute, 730 ILCS 5/5-5-6, upon; which Petitioners relied did not create " 'a legitimate claim of entitlement' " to restitution under this Court's decision in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). App. A, 5a. The court of appeals held that the Illinois Statute "unambiguously [left] the imposition of a restitution

order to the unfettered discretion of the district [sic][1] court". App. A, 6a.

Additionally, the court of appeals held that Naylor's defamatory statement at his press conference announcing dismissal of the criminal charges against Yordy's former employee was absolutely immune for the reason that the *Paul v. Davis*, "stigma plus" formulation "[did] not- . . . make an otherwise *inactionable* deprivation actionable merely by virtue of being accompanied by a defamatory remark". App. A, 7a. (Emphasis in original). The court said that because Naylor was absolutely immune for dismissing the criminal charges against Yordy's employee, Petitioners were obliged to "identify a 'plus' other than the indictment, trial, and related events," relying on its decision in *Buckley v. Fitzsimmons*, 20 F.3d 789, 798 (7th Cir. 1994), (on remand), cert. denied, 115 S.Ct. 740, (1995). App. A, 7a.

Petitioners' complaint alleged that Rose Ann Pepple, a secretary and bookkeeper at Petitioners' construction company between 1988 and 1991 stole $45,000.00 in company funds by way of forged checks. An Illinois grand jury indicted her for theft and forgery on April 11, 1991.

Respondent Naylor determined that the prosecution of those charges would be "too complicated" and asked Yordy to authorize dismissal of the charges and pursue a civil remedy against Pepple. Yordy refused and Naylor asked Yordy to submit to a polygraph examination which

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[1] Trial courts in Illinois are referred to as "circuit courts". Petitioners agree that the imposition of a restitution order is discretionary under Illinois law.

Yordy did on September 12, 1991. The results were described by the polygraph examiner as "inconclusive". On September 17, 1991, at a press conference, Naylor announced that he was dismissing the charges against Pepple for the reason that Yordy had been "less than truthful with us" and had "lied to the prosecutor".

REASONS FOR GRANTING THE WRIT

A.

The Court of Appeals' Decision Is In Conflict With Every Decision Of This Court Defining The Contours Of The Reputational Liberty Interest Protected By Due Process From Deprivation By Alteration Or Elimination Of A State Recognized Status Incident To Publication Of Defamatory Remarks.

In *Paul v. Davis*, 424 U.S. 693 (1976), this Court held that reputation by itself was not liberty or property protected by the due process clause of the Fourteenth Amendment. Rather, in order for a person's reputation to rise to an interest protected by the due process, it had to be injured incident to and because of a state actor's alteration or elimination of the person's state recognized status. 424 U.S. at 708. Thus, to be actionable as a violation of the Constitution under §1983, any defamatory statement had to be published in furtherance of the "depriv[ation] of . . . a right previously held under state law. . . . " *Id.* Cf. *Wieman v. Updegraph*, 344 U.S. 183 (1952), and *Joint Anti-Fascist Refugee Commission v. McGrath*, 341 U.S. 123 (1951).

The Court's holding in *Paul v. Davis, supra,* was reaffirmed in *Siegert v. Gilley,* 500 U.S. 226, (1991). In *Siegert,* this Court held there was no constitutional violation where the *Bivens (v. Six Unknown Narcotics Agents,* 403 U.S. 388 (1971)), plaintiff had voluntarily resigned his federal position and his supervisor thereafter put a defamatory writing in his personnel file which precluded the plaintiff from securing subsequent employment. The problem in *Siegert* was that at the time the plaintiff's status changed, he had changed it voluntarily and not incident to or because of any conduct injurious to his reputation.

The precedential context in which *Paul v. Davis* was decided and the precedents upon which the Court in *Paul* both relied and distinguished demonstrate that the state recognized status altered or eliminated incident to defamatory publications need not rise to a liberty or property right in the sense of a "legitimate claim of entitlement". That proposition is revealed first by the *Paul v. Davis* Court's treatment of *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). In *Constantineau,* the state defendants had, pursuant to a Wisconsin statutory scheme, "posted" the plaintiff whereby she was thereafter unable to purchase alcoholic beverage on account of her being deemed a hazard to herself, her family, or the community. The Court held that that action by the state assailed the plaintiff's "good name, reputation, honor or integrity", 400 U.S. at 437, "because of what the government [was] doing to her [ ]." *Id.* What it was doing to her was burdening what would otherwise have been her freedom, under

Wisconsin law, to purchase alcoholic beverages. Accordingly, the Court held that notice and opportunity for hearing were required.

Second, *Paul v. Davis'* consideration of *Board of Regents v. Roth,* 408 U.S. 564 (1972) demonstrates the Seventh Circuit's misconception of the liberty at stake in this case. In *Roth,* this Court upheld the discharge of a non-tenured professor without notice of reasons or hearing because he was deprived neither liberty nor property. Respecting "liberty", the Court said:

> "The state, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in the community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. *'For [w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential.'* "

Board of Regents v. Roth, supra, 408 U.S. at 564, (emphasis supplied). Thus, the Court held Roth was not deprived of liberty because there was no allegation that in being discharged he was guilty of any acts which would disable his ability to take advantage of other employment opportunities. *Id.* But, the Court held that if the board had fired Roth under circumstances where his "good name, reputation, honor or integrity," or his employment opportunities been diminished, he would have been deprived "liberty".

Additionally, the Court in *Roth* held that Roth had no "property" interest in his teaching position. It was in that context the court said:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it."

Roth, supra, 408 U.S. at 577. The reason for that the Court said was that,

> "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Id.

Thus, as recognized by *Paul v. Davis,* the Court in *Roth* distinguished between property and reputational liberty interests. No property interest exists in a state created benefit if there is no "legitimate claim of entitlement to it." *Roth, supra,* 408 U.S. at 577. Nevertheless, this Court in *Roth* still permitted the existence of a reputational liberty interest where an individual lost a state created benefit, even one to which he had no "legitimate claim of entitlement" but where his "good name, reputation, honor or integrity" were called into question. *Roth, supra,* 408 U.S. at 564. Therefore, *Roth* does not require that the status altered or eliminated by government action under circumstances implicating one's good name,

honor, or reputation need rise to the threshold of a "legitimate claim of entitlement" or what is commonly understood as a property interest. *Roth, supra,* 408 U.S. at 564 and 573.

Most importantly, *Paul v. Davis* itself makes clear that the "plus" to which the stigma must be attached in order to deprive an individual liberty without due process need not be a "legitimate claim of entitlement" rising to the definiteness of a property interest as defined in *Roth, supra.* The Court in *Paul* relied on *Hannah v. Larche,* 363 U.S. 420 (1960), where this Court had upheld against a due process challenge the investigative function of the Federal Civil Rights Commission in addressing complaints of interference with individual voting rights. The statutory scheme involved in *Hannah v. Larche* empowered the Commission to make public findings implicating individuals with having interfered with the exercise of voting rights. However, the Court in *Paul* observed that in *Hannah* it had explained that the Commission, in fulfilling its investigative function, "d[id] not and [could] not take any affirmative action which [would] affect an individuals's *legal rights.*" *Paul v. Davis, supra,* 424 U.S. at 706 n.4 (emphasis in original).

Subsequent to *Hannah v. Larche, supra,* and prior to *Paul v. Davis,* this Court decided *Jenkins v. McKeithen,* 395 U.S. 411 (1969). The Court's decision in *Jenkins v. McKeithen* demonstrates that official action that both stigmatizes and "affects . . . *legal rights*" must be accompanied by due process. *Paul, supra,* 424 U.S. at 706 n.4 (emphasis in *Paul*).

The Court said that the commission in *Jenkins v. McKeithen, supra,*

> "exercis[ed] an accusatory function; it [was] empowered to be used and allegedly [was] used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public."

Id. at 428. The Court held in *Jenkins* that the statute denied individuals publicly accused due process because it limited their rights to confront and cross-examine witnesses. In essence, thus, the statutory scheme deprived aggrieved persons due process because it precluded them access to a forum within that legislative scheme where they could clear their names.

No case decided by this Court subsequent to *Paul v. Davis,* has held the state created status or interest which is altered or eliminated incident to the utterance of defamatory statements should itself be subject to a "legitimate claim of entitlement".[2] One case, *Owen v. City of*

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[2] A panel of the Seventh Circuit recently characterized the *Paul v. Davis,* "stigma plus" rule as meaning, in addition to defamation, no more than a "palpable consequence". A palpable consequence as contemplated by the Seventh Circuit in *Albright, supra,* appears to be something less than the "legitimate claim of entitlement" which is the *Roth* definition of property. See also, *Colaizzi v. Walker,* 812 F.2d 304, 307 (7th Cir. 1987); *Johnson v. Martin,* 943 F.2d 15 (7th Cir. 1991); *Ratliff v. City of Milwaukee,* 79 F.2d 612, 625 (7th Cir. 1986); *McMath v. City of Gary, Indiana,* 976 F.2d 1026, 1031 (7th Cir. 1992), all standing for the proposition that the loss of public employment to which the employee had no legitimate claim of entitlement might still constitute a deprivation of liberty if done incident to the publication of false and stigmatizing reasons.

Independence, 445 U.S. 622, 633-634 n.13 (1980), is explicit that the interest of which a person is deprived need not be subject to a "legitimate claim of entitlement" (defamatory statements " 'in the course of termination of employment [at will]' " deprive person liberty without due process of law). Therefore, the decision by the court below holding that a deprivation of reputational liberty is contingent upon the alteration or elimination of a state created status to which an individual has a "legitimate claim of entitlement" is contrary to this Court's precedents and should, accordingly, be reviewed by this Court.

B.

The Seventh Circuit's Decision Is In Direct Conflict With Decisions Of The Fifth, Ninth, And Eleventh Circuits.

The decision below is in direct conflict with the Fifth Circuit's decision in *Marrero v. City of Hialeah*, 625 F.2d 499, 512-519 (5th Cir. 1980). In *Marrero*, the Court held that the *Paul v. Davis, supra*, "stigma plus" test was satisfied by defamatory statements injurious to state recognized right of business goodwill. The decision below is also contrary to the Ninth Circuit's decision in *Gobel v. Amricopa County*, 867 F.2d 1201, 1205 (9th Cir. 1989). In *Gobel*, the Ninth Circuit held that *Paul v. Davis', supra*, "stigma plus" test was satisfied where false statements were "made in connection with . . . illegal arrest". Additionally, the decision below is in conflict with the Eleventh Circuit's decision in *Marx v. Gumbinner*, 855 F.2d 783, 791 (11th Cir. 1988). In *Gumbinner* which is analogous to the case at bar except it involves a prosecutor's false

statement concerning a defendant, the court held the prosecutor amenable to suit under §1983.

C.

The Application Of The Prison "Liberty" Cases And Their Requirement Of "Substantive Predicates . . . Govern[ing] Official Conduct" "Mandating [An] Outcome . . . Upon A Finding The Relevant Criteria Have Been Met" Conflicts With This Court's Precedents Establishing Liberty As A Negative Freedom From Abuse Of Governmental Power Applicable To Reputational Liberty Under *Paul v. Davis*.

Kentucky Department of Corrections v. Thompson, supra, relied upon by the court below is inapposite to the reputational liberty Petitioners claim they were deprived. It is inapposite to liberty other than the positivist liberty created by state law most frequently discussed in connection with the rights of convicted prisoners in prison settings. See *Morrissey v. Brewer,* 408 U.S. 471 (1972); *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Meachum v. Fano,* 427 U.S. 215 (1976); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979); *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458 (1981); *Kentucky Department of Corrections v. Thompson, supra.*[3] Liberty, thus conceived, as in *Meachum v. Fano, supra,* involving a disciplinary transfer of state prisoners from one prison to another with less favorable conditions without hearing, does not deprive the prisoner liberty unless state law

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[3] Cf., However *Vitek v. Jones,* 445 U.S. 480 (1980); *Washington v. Harper,* 494 U.S. 210 (1990); *Foucha v. Louisiana,* 504 U.S. ___ 118 L.Ed.2d 437, 447 (1992).

conditions the authority to transfer prisoners on the occurrence of specified events. *Meachum, supra,* 427 U.S. at 228.

The liberty interests of inmates within the context of a prison system, cannot, under this Court's precedents, apply to liberty conceived as freedom from abuse of state power. *DeShaney v. Winnebago County,* 489 U.S. 189, 195 (1989); *Collins v. Harker Heights,* 503 U.S. ___ 117 L.Ed.2d 261, 269 (1992). Under our constitutional system, the state does not create liberty except in the limited circumstance of a statute or regulation creating areas of lesser liberty in the context of confinement or other institutionalization duly imposed pursuant to due process of law. *Meachum v. Fano, supra,* 427 U.S. at 230 (Stevens J., dissenting); Monhagan, *Of "Liberty" And "Property",* 62 Cornell L.Rev. 405, 411-334 (1977); Herman, *The New Liberty: The Procedural Due Process Rights Of Prisoners And Others Under The Burger Court,* 59 N.Y.U. L.Rev. 482, 528-533 (1984). Currie, *Positive And Negative Constitutional Rights,* 53 U.Chi. L.Rev. 864 (1986). See also Judge Posner's discussion in *Jackson v. City of Joliet,* 715 F.2d 1200, 1206 (7th Cir.), cert. denied, 465 U.S. 1049 (1983).

Thus, the prison "liberty" cases are analytically inadequate to accommodate the liberty protected by the Constitution, described as a "broad and majestic" concept embracing "the full range of conduct which the individual is free to pursue." *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). That description has been subsequently refined in two significant respects. First the liberty protected by the due process clause has been limited so as not to create "federal duties . . . analogous to those traditionally imposed by state tort law" *Collins v. Harker Heights,* 503

U.S. ___, 117 L.Ed.2d 261 (1992). That limitation was the essential holding of *Paul v. Davis, supra,* 424 U.S. at 701. Second, the liberty subject to due process protection has been limited to that which is abridged by "government . . . 'abusing its power or employing it as an instrument of oppression' ", *DeShaney, supra,* 489 U.S. at 196, quoting *Davidson v. Cannon,* 474 U.S. 344, 348 (1986).

But, in exempting the interest one has in his reputation by itself from due process protection, this Court in *Paul v. Davis,* could not have intended as it did not intimate that reputational liberty was of no higher value than a greater or lesser restriction on the already circumscribed "freedom" of convicted inmates in a prison setting. All this Court in *Paul v. Davis,* said was that no liberty interest protected by the due process clause existed in reputation unless one's reputation was stigmatized incident to official government action affecting one's legal interests. *Jenkins v. McKeithen, supra.*

To be sure, Petitioner Ross Yordy cannot claim a liberty interest in being free from a state published defamation of his reputation by itself. To do so would create a federal remedy for an act customarily redressed by the common law solely because the act was committed by a state actor. *Paul v. Davis, supra.* Nor can he claim as a deprivation of property or liberty protected by due process the loss of a job or other state created benefit in which he possessed no "legitimate claim of entitlement". *Board of Regents v. Roth, supra.*

But, the Seventh Circuit held a person suffers a loss of liberty protected by due process in the *Paul v. Davis,* setting only when he suffers defamation incident to the

loss of a state created interest to which he already has a "legitimate claim of entitlement". That holding renders the liberty interest one has in his good name and reputation under *Paul v. Davis,* superfluous. If a person suffers the loss of a state created status to which he has a "legitimate claim of entitlement" without notice or opportunity to be heard, it doesn't matter if he is defamed in the process. He already has a cause of action against the state actor for a violation of his due process rights. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

Thus, the holding below effectively eliminates a person's good name and reputation as an element deserving by itself any modicum of constitutional protection. This Court's precedents do not permit that conclusion.

D.

This Case Presents An Opportunity To Clarify Inconsistent Approaches To The Concept Of "Liberty" Protected By Due Process, An Issue Important To The Administration Of Government At All Levels.

If the substance of the liberty in one's reputation protected by due process is non-existent unless one has a "legitimate claim of entitlement" to the status which is altered or eliminated incident to a state published defamatory comment, the decision below is correct. In that event, government officials will be free whenever they fire a person from a government job in which the person has no property interest to defame him. Under those circumstances, it seems, *Board of Regents v. Roth, supra; Jenkins v. McKeithen, supra; Wisconsin v. Constantineau,*

supra, become dead letters so far as their enunciation of a person's interest in his good name is concerned. The potential for the abuse by government officials to cause gratuitous harm to individuals would be increased irrespective of whatever post-deprivation common law remedies might exist.

The foregoing proposition is underscored by *Paul v. Davis, supra.* In *Paul*, this Court insured that the Fourteenth Amendment not be made a "font of tort law to be superimposed upon on whatever systems may already be administered by the states." *Paul, supra*, 424 U.S. at 701. But, that concern and the concerns of this Court in similar cases[4] are not presented by this case. Rather, this case presents the exercise of government power at its most potent, the performance by a public prosecutor of two discrete acts, one clearly related to its judicial function, the dismissal of a criminal prosecution, the other not, falsely announcing the victim lied as the reason for the dismissal. *Buckley v. Fitzsimmons*, ___ U.S. ___, 125 L.Ed.2d 209, 229 (1993).

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[4] *Baker v. McCollan*, 443 U.S. 137 (1979) (no deprivation of liberty for mistaken arrest and imprisonment under facially valid warrant caused by misidentification); *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Zinermon v. Burch*, 494 U.S. 113 (1990) (no §1983 action for deprivation of liberty or property without due process where post-deprivation remedy available); *Ingraham v. Wright*, 430 U.S. 651 (1977) (no §1983 cause of action for deprivation of liberty as aspect of substantive due process for excess corporal punishment in public school system where state law provided remedy); *Daniels v. William*, 474 U.S. 327 (1986) (no §1983 cause of action for constitutional violation resulting from negligent conduct).

A public prosecutor's functions are,

> "[t]o protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public [by reason of which], a prosecutor is a 'minister of justice' . . . occupying a quasi judicial position".

Id. ABA Standards for Criminal Justice, Standard 3-1.1 commentary p.3-3.7 (1982). See also *Berger v. United States,* 295 U.S. 78, 88 (1935). When a public official so situated falsely and purposely harms the reputation of a citizen, even in the course of announcing an act for which he is absolutely immune, he can cause great damage. To the extent that he harms a person's reputation, without more, he is, under *Paul v. Davis, supra,* amenable only to whatever common law remedies the state permits. But, if that official damages a person's reputation incident to altering a state recognized status possessed by that person, he has affected that person's liberty protected by due process. *Paul v. Davis, supra; Jenkins v. McKeithen, supra; Board of Regents v. Roth, supra.*

The Seventh Circuit's decision dilutes the strength of the foregoing proposition to a redundancy. The Seventh Circuit's decision permits indiscriminate exercise by governmental officials, high and petty, of their power with the potential for greatly affecting the good names and reputations of citizens incident to affecting those citizens' legally recognized statuses. It is one thing to insure that the Constitution not supplant remedies already provided by state tort law, *Paul v. Davis, supra.* It is quite another to eliminate the Constitution altogether as a source of some protection for a person's good name. It has long been recognized as a fundamental tenet of our civilization that a person's good name is something to which he is

"entitled by reason and rational justice; since without [it] it is impossible to have the perfect enjoyment of any other advantage or right." Blackstone's Commentaries, 134 (Cooley's 4th Ed., 1899).

The holding below effectively eliminates the Constitution from any role in protecting that aspect of personal liberty associated with one's reputation. That holding is contrary to all this Court's precedents and is not justified by *Paul v. Davis*. Accordingly, the holding below should be reviewed because of its implications for the freedom of public officials to defame citizens while at the same time affecting their legal rights not amounting to "legitimate claims of entitlement" free of constitutional scrutiny.

E.

The Court Of Appeals' Decision Extending Absolute Immunity To A Prosecutor's Defamatory Statements At A Public Press Conference Even Where Such Statements Are Made In Connection With The Announcement Of An Absolutely Immune Prosecutorial Act Is In Direct Conflict With This Court's Decision In *Buckley v. Fitzsimmons*, 113 S.Ct. 2606 (1993).

In *Buckley v. Fitzsimmons, supra*, 125 L.Ed.2d at 229, this Court held that "[t]he conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions". Nevertheless, it is difficult to conceive that a public prosecutor is going to hold or participate in a press conference unrelated to his official functions. Therefore, it is to be expected that prosecutors will hold press conferences to advise the public of, for e.g., the return of an indictment or the dismissal of a case.

But, if in the same press conference the prosecutor gratuitously announces what he knows to be a false reason for doing an act for which he is otherwise absolutely immune, the immune act should not be permitted to insulate his conduct of the otherwise qualifiedly immune press conference from a section 1983 suit. To hold as did the court below robs *Buckley v. Fitzsimmons, supra,* of any precedential force. The holding below invites a cacophony of conflicting approaches in a sensitive and important area bearing upon both governmental functions and government's communication of those functions to the public. To insure that the lower courts do not reach conflicting results in an area bearing upon the conduct of government at all levels, it is important that this Court review the decision below. *See DeShaney, supra,* 489 U.S. at 194.

CONCLUSION

FOR THE FOREGOING REASONS, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

JOHN H. BISBEE
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August 21, 1995

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 94-2634

ROSS YORDY CONSTRUCTION COMPANY, an Illinois Corporation, and ROSS YORDY,
Plaintiffs-Appellants,

v.

SAMUEL NAYLOR, VI, in his individual capacity, ROSE ANN PEPPLE and STAN PEPPLE,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
No. 92 C 1388 – **Michael M. Mihm,** *Chief Judge.*

ARGUED DECEMBER 2, 1994 – DECIDED MAY 23, 1995.

Before FLAUM, GARZA and ROVNER, *Circuit Judges.**

ROVNER, *Circuit Judge.* Rose Ann Pepple was a secretary and bookkeeper at the Ross Yordy Construction Company between 1988 and 1991. After Yordy accused Pepple of stealing over $45,000 in company funds by way of forged checks during that period, an Illinois grand jury indicted her for theft and forgery on April 11, 1991.

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* The Honorable Emilio M. Garza of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

Hancock County State's Attorney Samuel Naylor VI subsequently concluded, however, that the prosecution of those charges would, in Yordy's words, be "too complicated." Naylor therefore asked Yordy to authorize dismissal of the charges and suggested that Yordy pursue a civil action instead. When Yordy refused, Naylor continued his investigation. As part of that process, Naylor asked Yordy to undergo a polygraph examination, which was conducted on September 12, 1991, and which yielded results described by the examiner as "inconclusive." Naylor then announced at a September 17, 1991 press conference that the charges against Pepple were being dismissed. In the course of his announcement, Naylor stated that Yordy had been "less than truthful with us" and that he had "lied to the prosecutor."

Yordy then brought this action under 42 U.S.C. § 1983, claiming that Naylor's actions had deprived him and his construction company of their status as victims of a criminal offense, which would have made them eligible for restitution under 730 ILCS 5/5-5-6. The district court dismissed Yordy's complaint, finding that the prosecutor was entitled to absolute immunity for his decision to drop the charges against Pepple and that the Illinois statute did not in any event create an entitlement to restitution.[1] We agree.

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[1] Yordy actually tried three times to state his claim, filing a complaint, an amended complaint and a second amended complaint, but the district court found similar flaws in all three. The complaints included two claims in addition to the one at issue here. First, Yordy maintained that Naylor's allegedly defamatory statements deprived him of his right of access to the courts by making it impossible for him to receive a fair civil trial of his

Yordy is himself aware of the difficulty of his position. He concedes the most obvious problem with his case, which is that prosecutors are absolutely immune from civil damages actions under section 1983 for conduct that is "intimately associated with the judicial phase of the criminal process," such as the initiation of a prosecution. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *see also Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2613-14 (1993); *Burns v. Reed*, 500 U.S. 478, 484-92 (1991). Yordy attempts to avoid that rule, however, by linking the prosecutor's decision to drop charges in this instance to his allegedly defamatory statements about Yordy. Yordy's theory is unavailing.

Yordy's argument begins with the straightforward proposition that a prosecutor's absolute immunity does not extend to out-of-court statements to the press. As the Supreme Court recently explained in *Buckley*,

> Comments to the media have no functional tie to the judicial process just because they are made by a prosecutor. At the press conference, Fitzsimmons did not act in " 'his role as advocate for the State[.]' " The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case

---

charges against Pepple in Hancock County. Yordy has not appealed the dismissal of that claim. Yordy also brought a state law claim against Rose Ann Pepple and her husband for conversion. That claim, which raises completely separate issues of both fact and law and which implicates different defendants, remains pending before the district court. The district court entered a Rule 54(b) judgment after dismissing Yordy's section 1983 claims, permitting this appeal.

> in court, or action preparatory for these functions. Statements to the press may be an integral part of a prosecutor's job, and they may serve a vital public function. But in these respects a prosecutor is in no different position than other executive officials who deal with the press, and, as noted above, qualified immunity is the norm for them.

113 S. Ct. at 2618 (citations omitted). Thus, Yordy could bring a simple defamation action against Naylor without running up against his shield of absolute immunity, but that would not achieve his apparent goal of stating a claim under section 1983.[2]

To that end, Yordy attempts to rely on the analysis of *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul*, Davis brought an action under section 1983 against the Louisville, Kentucky chief of police after Davis' name and photograph had appeared in a flyer depicting "active shoplifters," which was distributed to local merchants. Although Davis had been arrested for shoplifting, he had not been convicted. He claimed that his inclusion in the pamphlet

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[2] Yordy argues for the first time in his reply brief that he does not in fact have a cause of action under Illinois law. He cites 745 ILCS 10/2-202, which provides:

> A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct.

It is not clear to us from the face of the statute why it would preclude an action against a prosecutor for making defamatory statements at a press conference, but we need not concern ourselves with that question in any event. Whether Yordy has succeeded in stating a claim under section 1983 does not depend on whether he has an alternative state law cause of action.

deprived him of a liberty interest by inhibiting him from entering stores and by limiting his future employment opportunities. The court declined to elevate what it described as a classic defamation claim to the level of a constitutional tort. It did suggest, however, that defamation could in some instances be actionable under section 1983 if it was linked to the deprivation of "a right previously recognized under state law" (*id.* at 708), such as the right to purchase liquor or the right to attend school (*id.* at 708-710). *See also, Buckley v. Fitzsimmons,* 20 F.3d 789, 797 (7th Cir.1994) (on remand), *cert. denied,* 115 S.Ct. 740 (1995). Yordy attempts to apply that reasoning here, arguing that because Naylor's defamatory statement accompanied the deprivation of his status as a crime victim and of his consequent state law right to restitution, it is actionable under section 1983.

As the district court concluded, however, there are at least two flaws fatal to Yordy's theory. First, Yordy has failed to establish that Naylor's announcement affected a protected liberty or property interest. A protected interest is one to which the individual can show "a legitimate claim of entitlement." *Kentucky Dep't of Corrections v. Thompson,* 490 U.S. 454, 460 (1989). And 730 ILCS 5/5-5-6, on which Yordy bases his claim, does not create an entitlement to restitution. It provides:

> In all convictions for offenses in violation of the Criminal Code of 1961 committed against any person 65 years of age or older in which the person received any injury to their person or damage to their real or personal property as a result of the criminal act of the defendant, the court shall order restitution as provided in the Section. In all other cases the court shall at the

> sentence [sic] hearing determine whether restitution is an appropriate sentence to be imposed on each defendant convicted of an offense. If the court determines that an order directing the offender to make restitution is appropriate the offender may be sentenced to make restitution which shall be determined by the Court as hereinafter set forth. . . .

The statute unambiguously leaves the imposition of a restitution order to the unfettered discretion of the district court. *See People v. Strebin*, 568 N.E.2d 420, 424 (Ill. App. Ct. 1991) ("In all other instances (except certain offenses involving victims 65 years of age or older), the entry of an order of restitution is discretionary"). Thus Yordy, who has not alleged that he is 65 years of age or older, would not be entitled to restitution, even if Pepple were to be tried and convicted. *See Thompson*, 490 U.S. at 463 ("[T]he use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, forces a conclusion that the state has created a liberty interest."); *see also Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401, 1406 (7th Cir. 1994); *Kim Constr. Co. v. Bd. of Trustees*, 14 F.3d 1243, 1247 (7th Cir. 1994). He has not, therefore, been deprived of any "right previously recognized under state law," as required under the *Paul* analysis.

Nor would *Paul* help Yordy even if he were entitled to restitution under section 5/5-5-6. Yordy's loss of "victim" status resulted not from Naylor's allegedly defamatory statements, but from his absolutely immune decision to drop the charges against Pepple. *Paul* suggests that a defamation not otherwise actionable as a constitutional tort may in some instances rise to that level if it leads to

an otherwise *actionable* constitutional deprivation. *Paul* does not, however, make an otherwise *inactionable* deprivation actionable merely by virtue of being accompanied by a defamatory remark. As we explained in *Buckley*, 20 F.3d at 798, "a plaintiff who uses a 'stigma plus' approach to avoid *Paul* . . . must identify a 'plus' other than the indictment, trial, and related events for which the defendants possess absolute prosecutorial immunity." Naylor is absolutely immune from suit under section 1983 for his decision not to prosecute Rose Ann Pepple. That immunity is not affected by the fact that the announcement of his decision was accompanied by an allegedly defamatory remark, even though Naylor is not absolutely immune from suit for the remark itself.

Yordy has failed to state a claim under section 1983 and the district court's dismissal of his complaint is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court
of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ROSS YORK CONSTRUCTION COMPANY, INC., an Illinois corporation, and ROSS YORDY,	)	
Plaintiffs,	)	Case No. 92-1388
v.	)	
SAMUEL, NAYLOR VI, in his individual capacity, ROSEANNE PEPPLE a/k/a ROSEANNE RUSSELL a/k/a ROSEANNE TUTWILER, and STAN PEPPLE,	)	(Filed Aug. 6, 1993)
Defendants.	)	

ORDER

Pending before the Court is Defendant's Motion to Dismiss Count I of Plaintiff's First Amended Complaint (#12) and Magistrate Kauffman's Recommendation to grant Defendants' Motion to Dismiss (#19). For the reasons stated below, the Magistrate's Recommendation is accepted and the Defendant's Motion to Dismiss is granted.

BACKGROUND

Plaintiff Ross Yordy ("Yordy") operates a construction business, Ross Yordy Construction Company, Inc. ("Yordy Construction"), which is the other named Plaintiff in the case. The construction company is located in Hancock County. Rose Pepple, one of the Defendants,

worked for Yordy as a secretary bookkeeper between 1988 and January 10, 1991. In the course of executing her duties, Pepple had the authority to write and sign checks. The Complaint alleges that in 1989 Pepple began to write checks to herself in amounts significantly in excess of her salary. The Complaint also alleges that she converted to her own use close to $60,000 that was the property of Yordy and Yordy Construction. Yordy brought his suspicions concerning Pepple's activities to the attention of Hancock County law enforcement authorities. On April 11, 1991, a grand jury indicted her on two counts of theft of property over $300, in violation of Illinois law.

As Hancock County State's Attorney, Defendant Samuel Naylor ("Naylor") requested Yordy to authorize a dismissal of the criminal charges. Naylor made this request on the basis that the prosecution would be too complicated. Naylor urged Yordy to resolve the dispute in civil court, but Yordy refused to authorize the dismissal of the criminal charges. Subsequently, Naylor requested Yordy to submit to a polygraph examination as part of the continuing investigation. Yordy acquiesced and submitted to a polygraph test on September 12, 1991. The polygraph examiner reported that the examination was "inconclusive" with respect to Yordy's statements regarding the criminal charges against Rose Pepple.

On September 17, 1991, Naylor announced during a press conference the dismissal of all the charges against Pepple. In the course of the news conference, Naylor stated that Yordy had been "less than truthful with us." Because of Yordy's "untruthfulness," Naylor said that he would not proceed with the prosecution of Pepple. Yordy claims that this statement branded him as a "liar" and

thus defamed him. Yordy also claims that Naylor deprived him of his constitutionally protected liberty rights, property rights, and right of access to the courts. Yordy argues that Ill.Rev.Stat. ch. 38, ¶1005-5-6 (1977) conferred the liberty and property rights of which Naylor deprived him.

DISCUSSION

A complaint should not be dismissed unless it appears from the pleadings that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101 (1957). For purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and his factual allegations are taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 237, 94 S.Ct. 1683, 1687 (1974). In addition, a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 652 (7th Cir. 1984).

The Complaint alleges that Naylor has defamed Yordy as well as deprived him of a liberty right, a property right, and his right of access to the courts, all of which are rights guaranteed by the Fourteenth Amendment.

Yordy contends that Ill.Rev.Stat. ch. 38, ¶1005-5-6(b) creates a liberty and property right to restitution for victims of crime. According to Yordy, Naylor deprived him of these rights when Naylor dismissed the charges and announced the dismissal at a news conference. In

addition, Yordy asserts that Naylor falsely branded him a "liar" and disseminated prejudicial information by way of the press conference. As a result, Yordy identifies a loss of his right of access to the Courts since he cannot receive a fair civil trial in Hancock County.

Assuming arguendo that Naylor deprived Yordy of these rights, the Court must determine whether Naylor is entitled to absolute immunity for his acts. The Supreme Court has held that prosecutors enjoy absolute immunity for their conduct in "initiating a prosecution and in presenting the State's case," *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S.Ct. 984, 995 (1976), insofar as that conduct is "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Hence, the Supreme Court has adopted a "functional approach" in determining whether to accord absolute immunity to prosecutors. *Burns v. Reed*, ___ U.S. ___, 111 S.Ct. 1934, 1939 (1991). This approach scrutinizes "the nature of the function performed rather than the identity of the actor who performed that function." *Forrester v. White*, 484 U.S. 219, 229, 108 S.Ct. 538, 545 (1988). The official seeking absolute immunity bears the burden of showing that immunity is "justified for the function in question." *Butz v. Economou*, 438 U.S. 478, 508, 98 S.Ct. 2894, 2912 (1978). The essential functions deserving absolute immunity spring from a prosecutor's "role as advocate for the state" and may include acts preliminary to the "initiation of a prosecution" and "apart from the courtroom." *Burns*, 111 S.Ct. at 1939.

The Court now considers whether the absolute prosecutorial immunity recognized in *Imbler* is applicable to

(a) the dismissal itself, and (b) Naylor's allegedly defamatory remarks made incident to the dismissal. Based on the Supreme Court's recent decision in *Buckley v. Fitzsimmons*, 61 U.S.L.W. 4713 (Aug. 13, 1993), this Court denies Naylor's claim of absolute immunity for any violation flowing from the allegedly defamatory remarks made to the press. In *Buckley*, a prosecutor made false assertions that numerous pieces of evidence tied a defendant to the brutal murder of a young girl. The statements were made during a press conference during which the prosecutor announced indictments against Buckley and others. The Supreme Court in *Buckley* held that the prosecutor was not entitled to absolute immunity under those circumstances. *Buckley*, 61 U.S.L.W. at 4718. The Supreme Court in *Buckley* emphasized the absence of a "common-law immunity for a prosecutor's . . . out-of-court statements to the press." *Id.* at 4718. In addition, the Court found that the "functional approach" of *Imbler* counseled against extending immunity for prosecutorial press statements. The Court stated:

> The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions. Statements to the press may be an integral part of a prosecutor's job, see National District Attorneys Assn., National Prosecution Standards 1-7, 110 (2d ed. 1991), and they may serve a vital public function. But in these respects a prosecutor is in no different position than other executive officials who deal with the press, and, as noted above, *supra*, at 8-9, 18, qualified immunity is the norm for them.

Buckley, 61 U.S.L.W. at 4719. In light of this reasoning, this Court is bound to deny Naylor's claim of absolute immunity for the allegedly defamatory remarks made at the press conference.

However, the Court grants Naylor absolute immunity with regard to any claim based on the dismissal itself, that is, Yordy's alleged property and liberty interests. Assuming *arguendo* that ch. 38, ¶1005-5-6 confers such rights, these rights were extinguished by Naylor's decision to dismiss the case. The issue thus becomes whether a prosecutor is absolutely immune for dismissing a criminal case. Few functions are as fundamental to a prosecutor's "role as an advocate for the state" than the decision to prosecute or not prosecute. A decision not to prosecute cannot be classified as investigative or administrative; rather it must be considered a "special function" of a prosecutor.

Naylor's decision to dismiss is connected with the "initiation and conduct of a prosecution" requirement as set out in *Imbler*. Furthermore, Naylor dismissed the case after a grand jury returned indictments against Pepple. To this Court's knowledge, this requires the express approval of the relevant criminal court. Obviously, Naylor's decision to dismiss was thus "intimately associated with the judicial phase of the criminal process." Thus, it follows that Naylor's decision to dismiss is precisely the type of function entitled to absolute immunity.

In addition, the twin policy considerations announced in *Impler* justify the extension of absolute immunity for dismissals. In *Imbler*, the Supreme Court observed that the denial of absolute immunity could

undermine a prosecutor's independence and divert his energies. Such results would have "an adverse effect upon the functioning of the criminal justice system." *Imbler*, 424 U.S. at 427. This Court recognizes the analogous danger of denying Naylor absolute immunity here. If the victim of a criminal act could assert a property or liberty interest in the "potential for restitution," an alleged victim would have the power to compel a prosecution even though the prosecutor felt, for whatever reason, that the prosecution should not be pursued. That would clearly undermine prosecutorial independence and divert prosecutorial energies to an unprecedented degree.

Setting aside the absolute immunity issue, this Court additionally determines that ch. 38, ¶1005-5-6 does not confer a liberty right, property right, or a protected status on Yordy. Chapter 38, ¶1005-5-6 provides in relevant part:

> In all cases [other than certain offenses involving person [sic] 65 years of age or older] the court shall at the sentence hearing determine whether restitution is an appropriate sentence to be imposed on each defendant convicted of an offense. If the court determines that an order directing the offender to make restitution is appropriate the offender may be sentenced to make restitution which shall be determined by the court as hereinafter set forth. . . .

Ill.Rev.Stat. ch. 38, ¶1005-5-6 (1977). Yordy has not cited any case law interpreting this statute as conferring rights on victims. Moreover, Yordy does not come within the

ambit of the statute, since the statute requires a conviction. Further, the statute clearly makes restitution *contingent* upon the discretion of the court. This discretion is fatal to the "right to restitution" arguments, since prevailing law requires a right to be "legally enforceable or mandatory." *Wallace v. Robinson*, 940 F.2d 243, 246-47 (7th Cir. 1991). As the statute does not afford Yordy a right, the constitutionally protectable property and liberty claims fail in any case.

The Complaint also alleges that Naylor has violated Yordy's right of access to the courts. Yordy alleges that Naylor's defamatory remarks branding him a "liar" made him appear as someone unworthy of belief in Hancock County. Yordy believes that this "stigma" severely burdens and impairs any civil action which Yordy could have brought against Pepple.

First the Court does not recognize this claim as a "right of access" claim. It is more appropriately defined as a right to fair trial claim. *See Buckley v. Fitzsimmons*, 61 U.S.L.W. at 4718. Clearly, the Fourteenth Amendment entitles Yordy to a fair opportunity to present his claim. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1263 (7th Cir. 1984). Judicial access is "fair" when it is "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 1495 (1977). Apparently, Yordy feels that his access would not be "meaningful" because Naylor had prejudiced the people of Hancock County against Yordy.

However, Yordy's claim that Naylor deprived him of a fair trial is mere speculation. Yordy never filed a civil action against Rose Pepple. The record contains no evidence in support of Yordy's assertion that he could not

receive a fair trial. The Court cannot find a constitutional violation based merely on the Plaintiff's subjective evaluation of his chances of receiving a fair trial. Moreover, the court system contains a variety of devices designed to produce an impartial jury. Under Illinois law, parties have the right to the *voir dire* of a jury as well as preemptory challenges and challenges for cause. Ill.Rev.Stat. ch. 100A, ¶234 (1991); Ill.Rev.Stat. ch. 110, ¶¶2-1105.1 and 2-106 (1991). If these procedures proved inadequate, Yordy could request a change of venue to a county where Naylor's statements had not been disseminated. Ill.Rev.Stat. ch. 110, ¶2-1001(a)(2).

CONCLUSION

For the reasons set forth above, the Magistrate's Recommendation is adopted. This case is referred back to the magistrate for further proceedings.

ENTERED this 6th day of August, 1993.

/s/ Michael M. Mihm
Michael M. Mihm
Chief United States
District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ROSS YORDY CONSTRUCTION COMPANY, INC., an Illinois corporation, and ROSS YORDY,

Plaintiffs,

v.

SAMUEL NAYLOR VI, in his individual capacity, ROSEANNE PEPPLE a/k/a ROSEANNE RUSSELL a/k/a ROSEANNE TUTWILER, and STAN PEPPLE,

Defendants.

Case No. 92-1388

(Filed Sep. 30, 1993)

ORDER

Before this Court is Plaintiffs' Motion to Reconsider or to Correct Opinion; Alternatively and as Necessary, for Leave to Amend the Complaint (#26). This Court considers this a Motion to Alter or Amend a Judgment under Rule 59(e) of the Federal Rules of Civil Procedure because Plaintiffs' motion was filed within "10 days after entry of the judgment." Fed.R.Civ.P. 59(e).

Plaintiffs' Motion to Alter or Amend a Judgment is denied. Plaintiffs argue that this Court did not address the claim that Plaintiffs presented to this Court. Specifically, Plaintiffs argue that this Court's order of August 6, 1993 did not "address the issue as to whether Ill.Rev.Stat. ch. 38, ¶1005-5-6 creates a protected status, the alteration or extinguishment of which incident to defamation deprives the victim of liberty under the Fourteenth Amendment." (Plaintiffs' Motion to Reconsider, p. 14).

This court did not reach the general question of whether Ill.Rev.Stat. ch. 38, ¶1005-5-6 creates a protected status the alternation or extinguishment of which incident to defamation deprives the victim of liberty under the Fourteenth Amendment because this Court determined that Plaintiff Yordy was not covered by the statute in question. Therefore, this Court did not need to reach the more general question presented by Plaintiffs. On pages 7-8 of this Court's order, this Court stated, "[T]his Court additionally determines that Ch. 38, ¶1005-5-6 does not confer a liberty right, property right, or a protected status on Yordy." This court held that plaintiff Yordy did not "come within the ambit" of Ill.Rev.Stat. ch. 38, ¶1005-5-6 because the statute requires a convicted defendant. No convicted defendant was present in this case, and therefore, Yordy was not afforded any rights under the statute.

THEREFORE, this Court denies Plaintiffs' Motion to Alter or Amend Judgment. This Court grants Plaintiffs' Motion for Leave to Amend the Complaint. Plaintiffs have 21 days from the date of this order to file an Amended Complaint if Plaintiffs desire. However, this Court reminds Plaintiffs of Rule 11 of the Federal Rules of Civil Procedure.

ENTERED this 30th day of September, 1993.

/s/ Michael M. Mihm
Michael M. Mihm
Chief United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 23, 1995

Before: **Honorable** JOEL M. FLAUM, Circuit Judge
Honorable EMILIO M. GARZA, Circuit Judge*
Honorable ILANA DIAMOND ROVNER,
Circuit Judge

No. 94-2634

ROSS YORDY CONSTRUCTION COMPANY,
an Illinois corporation and ROSS YORDY,
Plaintiffs - Appellants

v.

SAMUEL NAYLOR, VI, in his individual capacity,
ROSE ANN PEPPLE, also known as
ROSE ANN RUSSELL, also known as
ROSE ANN TUTWILER and STAN PEPPLE,
Defendants - Appellees.

Appeal from the United States District Court for the
Central District of Illinois, Peoria Division
No. 92 C 1388, Michael M. Mihm, Chief Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

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* The Honorable Emilio M. Garza of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

(2)

Supreme Court, U.S.
FILED
OCT 2 1995
CLERK

No. 95-303

In The

Supreme Court of the United States

October Term, 1995

ROSS YORDY CONSTRUCTION COMPANY, INC., an Illinois corporation and ROSS YORDY,

Petitioners,

v.

SAMUEL NAYLOR, VI, in his individual capacity,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Whether the court of appeals properly found that Plaintiffs failed to state a cause of action for a violation of a constitutional right and that Plaintiffs failed to allege a state created status or right.

2. Whether the court of appeals properly held that Plaintiffs could not combine a defamation claim with a deprivation caused by an absolutely immune act in order to state a cause of action.

3. Whether Plaintiffs are unable to claim a denial of their due process rights because they cannot allege nor prove inadequate state remedies.

4. Whether qualified immunity bars Plaintiffs' claims against Naylor because he violated no clearly established constitutional right.

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SUMMARY OF ARGUMENT

The court of appeals correctly held that Plaintiffs failed to establish a cognizable claim under 42 U.S.C. Section 1983 for alleged violations of Plaintiffs' constitutional rights. Plaintiffs assert that besides being defamed, they were denied a state created right to a status as "victims" of a criminal offense. Mere defamation is not actionable under the Due Process Clause. *Paul v. Davis*, 424 U.S. 693, 706 (1976). However, stigmatizing injury to reputation is actionable when it is connected with an injury to a more tangible interest. *Id.* at 701. The nature and scope of such protected interests is narrow. *See Siegert v. Gilley*, 500 U.S. 226 (1991). Plaintiffs attempt to base their tangible benefit or status upon their alleged status as "victims" of a charged criminal offense, as well as a possible right to restitution. Both the right to restitution and the status of "victim" are contingent upon actions which may or may not have occurred if the criminal prosecution had proceeded. Accordingly, Plaintiffs had no more than a unilateral expectation to these alleged rights and have failed to state a due process claim.

Even if Plaintiffs could claim some right or status, there is an insufficient nexus between the alleged defamation and the constitutional deprivation claimed. *See Siegert*, 500 U.S. 226. Any damages which Plaintiffs could or would have suffered are contingent upon obtaining a conviction in the underlying criminal matter. That connection was cut off by the dismissal of the prosecution, not any defamatory statements. Any opportunities Plaintiffs may have to press later civil charges against the criminal defendant were not impacted by the defamation.

Further, prosecutors are absolutely immune for their decisions to dismiss criminal charges. While statements to the press are not entitled to absolute immunity, *Buckley v. Fitzsimmons*, ____ U.S. ____, 113 S.Ct. 2606, 2617 (1993), Plaintiffs alleged deprivation of rights was not caused by the defamation but was actually caused by the dismissal of the criminal prosecution. The court of appeals properly held that Plaintiffs cannot rely on an immune act to support otherwise non-actionable defamation claims. This separation of immune from non-immune acts has a long standing history in the various federal circuits in the context of police officers. The federal circuits are in agreement that a police officer who engages in investigative misconduct can not normally be held liable for the consequences of an indictment and prosecution because those decisions are made by others who enjoy absolute immunity for those decisions. (See cases cited, *infra*, pp. 13-14). Therefore, the appellate court correctly held that Plaintiffs' claims arising from statements to the press failed to set forth any cause of action against the Defendant, Naylor, apart from those which are clearly barred under the doctrine of absolute immunity.

Plaintiffs' due process claim also must fail because they have not challenged the adequacy of Illinois post-deprivation remedies. *Parratt v. Taylor*, 451 U.S. 527, 535-44 (1981). Naylor's status as a policy maker does not mean that his actions were not "random and unauthorized." *Easter House v. Felder*, 910 F.2d 1387, 1400-01 (7th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991). Naylor's alleged comments on Plaintiffs' credibility would have exceeded the Illinois restrictions on extra-judicial public comments. Accordingly, Naylor's statements would constitute a "random

and unauthorized" act under *Parratt*. Illinois law clearly provides adequate remedies to redress the alleged harm caused by Naylor. Further, Plaintiffs' failure to proceed in state court forestalls any ability to determine if an impartial jury could have been impaneled in the later civil trial. *See Martin v. Merola*, 532 F.2d 191, 194 (2d Cir. 1976).

Finally, Naylor is entitled to qualified immunity for his statements to the press. Naylor could not have known that in making the alleged defamatory remarks, he would deprive Plaintiffs' of a clearly established liberty or property interest. *See Buckley v. Fitzsimmons*, 20 F.3d 789, 797 (7th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 U.S. 740 (1995). Plaintiffs' alleged rights as victims of a criminal offense were not altered by Naylor's statements but only by the dismissal of the prosecution for which he was absolutely immune. Neither Plaintiffs nor Defendant have found any analogous cases sufficient to show that Plaintiffs' rights were clearly established. Plaintiffs have not cited any cases where a defamation claim combined with a possible or contingent status was found sufficient to state a constitutional deprivation. Moreover, Plaintiffs cannot show that a reasonable official should have known that the available state remedies were inadequate. Accordingly, Naylor is entitled to qualified immunity.

No. 95-303

In The

Supreme Court of the United States

October Term, 1995

ROSS YORDY CONSTRUCTION COMPANY, INC.,
an Illinois corporation and ROSS YORDY,
Petitioners,

v.

SAMUEL NAYLOR, VI, in his individual capacity,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

THE COURT OF APPEALS PROPERLY FOUND THAT PLAINTIFFS FAILED TO STATE A CAUSE OF ACTION FOR A VIOLATION OF A CONSTITUTIONAL RIGHT AND THAT PLAINTIFFS FAILED TO ALLEGE A STATE CREATED STATUS OR RIGHT.

To establish a cognizable claim under 42 U.S.C. Section 1983, Plaintiffs Ross Yordy Construction Company, Inc. and Ross Yordy (hereinafter "Plaintiffs") are required to show that Defendant Samuel Naylor, VI (hereinafter "Naylor") deprived them of a right secured by the Constitution of the United States and that the deprivation was achieved under color of law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Plaintiffs have claimed that their rights arose under the Fourteenth Amendment. To determine whether Plaintiffs have stated a due process claim, the court must look to the nature of the interest at stake and determine if it is within the scope of the Fourteenth Amendment's protection of liberty and property. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972).

The range of interests protected by the Fourteenth Amendment "are created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. Accordingly, the Fourteenth Amendment is implicated whenever a government actor seeks to remove or significantly alter cognizable benefits, rights, or status without affording the deprived individual due process. *Paul v. Davis*, 424 U.S. 693, 711 (1976). *See also Sherwin*

Manor Nursing Center, Inc. v. McAuliffe, 37 F.3d 1216, 1220 (7th Cir. 1994), *petition for cert. filed*, 64 U.S.L.W. 3068 (June 29, 1995) (due process claims require "a property deprivation of constitutional magnitude").

Under *Roth*, in order to seek the protection of a "property" right under the Due Process Clause, Plaintiffs are required to show that the right deprived was one which Plaintiffs must "clearly have more than an abstract need or desire for . . . [They] must have more than a unilateral expectation of it. [They] must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. However, Plaintiffs argue that *Roth* holds that a person who cannot claim a "property" right (employment in *Roth*), may still claim a "liberty" right, if that right is terminated in connection with a public actor's imposition of a "stigma" on the individual. *Roth*, 408 U.S. at 573.

Plaintiffs rely on the *Roth* liberty right "stigma-plus" analysis, more fully developed in *Paul v. Davis* because this Court has consistently rejected the proposition that reputation alone is either "liberty" or "property" protected by the Constitution. *See Paul*, 424 U.S. at 701-07. "[T]he mere defamation of an individual ... [is not] sufficient to invoke the guarantees of procedural due process. . . ." *Id.* at 706. However, *Paul* held that stigmatizing injury to reputation is actionable when it is connected with an injury to a more tangible interest, such as loss of employment. *Id.* at 701.

This Court has suggested how narrow the nature and scope of such protected liberty interests are when it rejected a stigma-plus claim because plaintiff voluntarily resigned his employment three weeks prior to the defamatory publication being made. *Siegert v. Gilley*, 500 U.S. 226 (1991). Even though the defamatory comments had the effect of limiting

plaintiff's future employment prospects, *Siegert* held that the plaintiff failed to establish a violation of a constitutional right because the alleged defamation was not "uttered incident to the termination of Siegert's employment . . . ." *Id.* at 234. This Court has also held that a "state creates a protective liberty interest by placing substantive limitations on official discretion." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462 (1989). To have a protected interest whether it be property or liberty, the Due Process Clause requires that the law, regulation or standard contain "explicitly mandatory language." *Id.* at 463.[1]

The tangible benefit or "status" Plaintiffs base their Fourteenth Amendment claim upon is founded in Illinois law which Plaintiffs believe confers upon them specific legal rights as "victims" of a *charged* criminal offense. Plaintiffs allege that the State of Illinois has conferred a legally cognizable status on "victims" of crime, according them various rights. As examples, Plaintiffs specifically enumerate two "victims rights:" (1) the right "to be notified by the office of the State's Attorney before the office of the State's Attorney makes any offer of a plea bargain to the defendant or enters into negotiations with the defendant concerning a possible plea bargain;" 725 ILCS 120/4(6) (1992) and (2) the right "to be notified . . . of the ultimate disposition of the cases arising from an indictment or an information . . . . " 725 ILCS 120/4(7) (1992). First, Plaintiffs have made no allegation that Naylor made an offer of a plea bargain or entered into any negotiations with former employee Rose Pepple concerning a plea bargain; thus, this

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[1] Plaintiffs argue that liberty cases of this type regarding prison settings are inapplicable. However, the only cases which Plaintiffs cite showing a lesser standard are employment cases which are clearly distinguishable due to the liberty interest granted in occupation. *See, e.g., Colaizzi v. Walker*, 812 F.2d 304, 307 (7th Cir. 1987).

"right" is not implicated. Second, while a victim may be accorded by law the "right" of notification concerning the ultimate disposition of a case, the statute does not provide for when or how such notification must occur. Moreover, the "victims rights" statute at the time of Plaintiffs' alleged harm required that victims had to make a "specific request" of the State's Attorney, prior to the State's Attorney being required to provide information to a victim. 725 ILCS 120/4. Plaintiffs fail to make any allegation that they made a specific request of the State's Attorney which was subsequently denied, and for this reason alone they are deprived the "status" they seek.

Perhaps in recognition of the fact that "victim" status under 725 ILCS 120/4 and any possible harm is nebulous and hard to ascertain, Plaintiffs seek protection under a victim's restitution statute. The statute states in pertinent part that:

> . . . the court shall at the sentence hearing determine whether restitution is an appropriate sentence to be imposed on each defendant convicted of an offense. If the court determines that an order directing the offender to make restitution is appropriate, the offender may be sentenced to make restitution which shall be determined by the Court.

730 ILCS 5/5-5-6 (1992).

Plaintiffs claim this statute confers upon them the status of "victims of charged criminal offenses" who have a legal right to restitution. However, certain key elements of this Illinois

statute were deemed significantly lacking by the lower courts in Plaintiffs' case.

First, the statute under Illinois law does not apply to "victims of *charged* criminal offenses." Any claimed right Plaintiffs may have under this statute vests, if at all, *only* upon criminal conviction. *See People v. Nasser*, 223 Ill. App. 3d 400, 584 N.E.2d 1010, 1016 (4th Dist. 1991), *aff'd*, 153 Ill.2d 195, 606 N.E.2d 1167 (1992) ("a criminal defendant becomes subject to an order of restitution *only after* he has been convicted") (emphasis added). As a result, Plaintiffs cannot claim restitution until a conviction, if any, is rendered. To recognize Plaintiffs' claim of a legally cognizable status at this juncture would presuppose that former employee Rose Pepple would have been convicted of the charges against her.

Second, a victim's right to restitution is not automatic in Illinois. Following conviction, "the trial court should satisfy itself of the legitimacy of any claim for restitution, as well as the amount of the claim." *Nasser*, 584 N.E.2d at 1016, *citing* 730 ILCS 5/5-3-2(a)(3). Restitution is merely a part of the sentence an Illinois criminal defendant could be given. It is clear that restitution to the victim is not mandatory in Illinois; rather, the state court is vested with discretion regarding whether to enter such an order. *People v. Strebin*, 209 Ill. App. 3d 1078, 568 N.E.2d 420, 424 (4th Dist. 1991).

Against this backdrop, it is inarguable that Plaintiffs' claim would fail under *Roth* because Plaintiffs cannot argue more than a unilateral expectation of the right to restitution given the uncertainty of whether a conviction would issue and, if so, whether the trial court would order restitution. Even if victims are granted certain rights under Illinois law, it is not a "right" or "status" Plaintiffs had yet attained. If Plaintiffs' minor alleged deprivation is enough to state a liberty interest or

property right, a deprivation of any kind, no matter how small, would have to be considered a due process violation under Section 1983.

Thus, Plaintiffs have failed to assert a claim for deprivation of some previously held tangible interest -- a governmental right, benefit or entitlement. *See Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990) (evaluation of due process claims requires a determination of whether there was a deprivation of a protected interest). Further, this Court should not grant *certiorari* to decide a case which is essentially a question of Illinois law.

Even assuming Plaintiffs could legitimately claim some right or "status" under 730 ILCS 5/5-5-6, there is an insufficient nexus between the alleged defamation and the constitutional deprivation claimed. *See Siegert*, 500 U.S. 226; *Botefur v. City of Eagle Point*, Or., 7 F.3d 152, 157 (9th Cir. 1993) (no Section 1983 cause of action where alleged defamatory statements were made after plaintiff's resignation); *Vukadinovich v. Bd. of School Trustees of Michigan City Area Schools*, 978 F.2d 403 (7th Cir. 1992), *cert. denied*, ____ U.S. ____, 114 S.Ct. 133 (1993) (derogatory comments made by Board members about an employee, *after* they had fired him, were not actionable under the Fourteenth Amendment because the employee at the time faced no threat of lost government employment) (emphasis supplied); *Mahoney v. Kesery*, 976 F.2d 1054 (7th Cir. 1992) (plaintiff must show that the defamation itself brought about the denial of constitutional rights).

Naylor's only action which actually impacted Plaintiffs was his dismissal of the charges against Pepple. This dismissal ruled out the possibility of a criminal conviction -- the statutory prerequisite to a court's consideration of an order of restitution.

See 730 ILCS 5/5-5-6. Naylor's alleged defamatory comments, made after the case was dismissed, had no impact on Plaintiffs' right to restitution. Further, it is uncertain whether Defendant Rose Pepple would have been convicted of the crimes charged.

Moreover, Plaintiffs' claims in regard to their inability to seek civil redress against Pepple are similarly insufficient to state a claim of entitlement under the Fourteenth Amendment because they allege an untested "future" harm resulting only from the lasting vestiges of the alleged defamation. Importantly, *Siegert* specifically rejected a claim based upon a future harm. *Siegert*, 500 U.S. 226, 233. Any loss of future employment, flowing from the defamatory letter, was damage resulting from injury caused to Siegert's reputation, which injury is not compensable. *Id.* at 234 .

Due to Illinois law, Plaintiffs' claims of "future" harm are also subject to rejection because Plaintiffs can present no solid evidence that they had a legal status under 730 ILCS 5/5-5-6 or that their prospects of gaining civil redress from Pepple have been impacted by Naylor's alleged defamation. Moreover, any impact Naylor's comments would have on Plaintiffs' ability to press civil charges against Pepple would flow from a harm to reputation, which is clearly not compensable under Section 1983. As such, Naylor's alleged defamatory remarks cannot be said to have a sufficient nexus with the harm alleged by Plaintiffs so as to state a stigma-plus claim under *Paul v. Davis*, 424 U.S. 693.

Accordingly, *certiorari* should be denied.

II.

THE COURT OF APPEALS PROPERLY HELD THAT PLAINTIFFS COULD NOT COMBINE A DEFAMATION CLAIM WITH A DEPRIVATION CAUSED BY AN ABSOLUTELY IMMUNE ACT IN ORDER TO STATE A CAUSE OF ACTION.

Clearly, Naylor, as a prosecutor, is absolutely immune for his decision to dismiss criminal charges. *Buckley v. Fitzsimmons*, ____ U.S. ____, 113 S.Ct. 2606 (1993); *Burns v. Reed*, 500 U.S. 478, 486 (1991). Plaintiffs have, as a result of Naylor's acts, been deprived the opportunity of proceeding with the filed criminal charges against Pepple. As Plaintiffs have previously conceded, however, the determination of whether or not to prosecute is intimately associated with the judicial function, and prosecutors are accorded absolute immunity from liability for injury based upon these types of decisions. *Imbler v. Pachtman*, 424 U.S. 409, 422 (1976).

On the other hand, Plaintiffs argue that the alleged defamatory comments made by Naylor during the press conference in conjunction with the dismissal of charges against Pepple states a violation of the Fourteenth Amendment. The Seventh Circuit stated on remand in *Buckley* that when "a plaintiff . . . uses a 'stigma-plus' approach to avoid *Paul* and *Siegert*, [he] must identify a 'plus' other than the indictment, trial and related events for which the defendants possess absolute prosecutorial immunity." *Buckley v. Fitzsimmons*, 20 F.3d 789, 798 (7th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 740 (1995). Plaintiffs have identified their loss as a loss of "exalted" status as victims who could gain restitution under 730 ILCS 5/5-5-6. If such a status could be afforded Plaintiffs under Illinois law, it is inarguable that they lost this status because Naylor dismissed charges against Pepple, not because

he allegedly defamed Plaintiffs. *See Buckley*, 20 F.3d at 798. Due to Naylor's absolute immunity, Plaintiffs have not identified a "plus" for which Naylor is potentially liable. *Id.* at 798.

The real dispute, therefore, is whether Plaintiffs can bootstrap their defamation claim onto the dismissal of the criminal charges; or whether, as the court of appeals held, Plaintiffs cannot rely on an immune act in order to give life to otherwise non-actionable defamation claims. Plaintiffs argue that the appellate court's decision in this case effectively "robs" this Court's decision in *Buckley v. Fitzsimmons*, 113 S.Ct. 2606, "of any precedential force" (Petition, p. 20). However, the appellate court effectively accommodated this Court's conclusion in *Buckley* that absolute immunity is unavailable for non-prosecutorial functions, while simultaneously preserving the immunity which still remains available for prosecutorial acts. The plurality opinion in *Buckley* expressly left the door open for such an approach. *Buckley*, 113 S.Ct. at 2615 ("location of the injury may be relevant to whether a complaint has adequately alleged a cause of action for damages"). Justice Scalia suggested in concurrence that this approach was indeed appropriate (*Id.* at 2620), and the dissent "implied agreement." *Buckley*, 20 F.3d at 792, *citing* 113 S.Ct. at 2622 (Kennedy, J., dissenting). Plaintiffs' attempt to state a cause of action reveals a thinly disguised effort to recover against Naylor for his decision not to prosecute Pepple. If Plaintiffs are not seeking to impose liability for immune acts, then their claim should properly be assessed independent of those immune acts, and the appellate court properly resolved the issue on those grounds.

This separation of immune from non-immune acts has a long standing history in the various federal circuits in the context of police officers. For example, police officers who engage in investigative misconduct are generally not held liable for the consequences of an indictment and prosecution because

those decisions are made by prosecutors cloaked with absolute immunity. *See Barts v. Joyner*, 865 F.2d 1187, 1195-96 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989); *Smiddy v. Varney*, 665 F.2d 261, 266-67 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982); *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988); *Dellums v. Powell*, 566 F.2d 167, 192-94 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). *See also Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (only when officer deceives prosecution may officer be held liable for improper prosecution); *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir.), *cert. denied*, 459 U.S. 1005 (1982) (indictment is absolute bar to claim against police officer).

Accordingly, the Seventh Circuit's decision is in harmony with this Court's decision in *Buckley*, 113 S.Ct. 2606 and the decisions of the other federal circuit courts.[2] Therefore, Plaintiffs' claims arising from statements to the press failed to set forth any cause of action against Naylor apart from those which are clearly barred under the doctrine of absolute immunity.

III.

PLAINTIFFS ARE UNABLE TO CLAIM A DENIAL OF THEIR DUE PROCESS RIGHTS BECAUSE THEY CANNOT ALLEGE NOR PROVE INADEQUATE STATE REMEDIES.

Because Plaintiffs have not alleged they were denied notice or a right to a hearing prior to the denial of their due process rights, one must assume that they are alleging a violation of their substantive and not procedural due process

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[2]*See Powers v. Coe*, 728 F.2d 97, 105 (2d Cir. 1984) (plaintiff must show constitutional deprivation *caused* by press statement).

rights.[3] It is clear that a government official's "random and unauthorized" deprivation of a right or interest cannot be challenged under Section 1983 when the state provides an adequate post-deprivation remedy. *Parratt v. Taylor*, 451 U.S. 527, 535-544 (1981); *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). Naylor's status as a policy maker or high ranking public official does not mean that his actions cannot be characterized as "random and unauthorized." *Easter House v. Felder*, 910 F.2d 1387, 1400-01 (7th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991).

No one could predict if or when a State's Attorney would make defamatory statements. In this case, Naylor's alleged comments on Plaintiffs' credibility and polygraph test would have exceeded the restrictions which the State of Illinois has placed on extra-judicial public comments. *Illinois Rules of Professional Conduct*, Rule 3.6 (1991). *See also Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 252-53 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (prosecutors may be subject to restrictions on speech). Further, attorneys are subject to the Attorney Registration and Disciplinary Commission and Illinois defamation laws. Naylor's alleged deviation from these standards, therefore, was "random and unauthorized."

Accordingly, the only remaining question is whether

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[3]Supreme Court reluctance to expand the concept of substantive due process has led it to provide the protections it affords to a narrow class of issues, i.e., matters relating to marriage, family, procreation and the right to bodily integrity. *Albright v. Oliver*, ____ U.S. ____, 114 S.Ct. 807, 812 (1994). "[J]udicial self restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. It is important, therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what [defendant] did to deprive [her of it]." *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992).

Illinois provides adequate remedies to redress the harm caused by Naylor's alleged violations of these standards. Illinois law provides numerous safeguards, which were adequate either by themselves or in combination, to ensure the integrity of a later state civil trial. Parties have the right to the *voir dire* of a jury as well as peremptory challenges and challenges for cause. Ill. S.Ct. Rule 234 (1992); 735 ILCS 5/2-1105.1 (1992) and 5/2-1106 (1992). If these procedures proved inadequate, Plaintiffs could request a change of venue to a county where Naylor's statements were not disseminated. 735 ILCS 5/2-1001.5 (1992). These remedies have been provided because the law has "foreseen that the minds of all potential jurors may not be clean slates." *See Schiavone Const. Co. v. Merola*, 678 F. Supp. 64, 66 (S.D.N.Y.), *aff'd*, 848 F.2d 43, *cert. denied*, 488 U.S. 855 (1988).

Plaintiffs' failure to proceed in state court forestalls any ability to determine if an impartial jury could have been impaneled. *See Martin v. Merola*, 532 F.2d 191, 194 (2d Cir. 1976). *See also Powers v. Coe*, 728 F.2d 97, 105 (2d Cir. 1984) (plaintiffs must show that other remedies were unavailable or were used to no avail to alleviate the effects of unfavorable press). Plaintiffs are only speculating that they could not have obtained a fair trial. Accordingly, Plaintiffs have failed to state a claim, *Martin*, 532 F.2d at 194, and this Court should not grant Plaintiffs' petition for *certiorari*.

IV.

QUALIFIED IMMUNITY BARS PLAINTIFFS' CLAIMS AGAINST NAYLOR BECAUSE HE VIOLATED NO CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT.

To the extent that Plaintiffs are able to avoid the holding of *Paul v. Davis*, Naylor is entitled to qualified immunity because Naylor could not have known that in making the alleged defamatory remarks he deprived Plaintiffs of a liberty or property interest. *See Buckley v. Fitzsimmons*, 20 F.3d 789, 797 (7th Cir. 1994), *cert. denied*, ____ U.S.____, 115 S.Ct. 740 (1995). As this Court well knows, government officials are immune from liability for performance of their discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "A necessary concomitant to the determination of whether the constitutional right asserted by plaintiff is clearly established at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Only if such a claim is properly made must the court determine whether the public official's actions could have reasonably been thought consistent with the asserted constitutional right. Such a two-step analysis "permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits." *Siegert*, 500 U.S. at 232.

The contours of the right an official is alleged to have violated must be sufficiently clear so that a reasonable official can understand that he is violating that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If this protection was

not afforded government officials, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 639. A fact-specific application of qualified immunity provides the only manner in which a public official may avoid a monetary judgment for actions taken during the development of bright line constitutional standards.

At the heart of Plaintiffs' claim is their alleged right as "victims" of a charged criminal offense, which is predicated on Illinois law interpreting 730 ILCS 5/5-5-6. Similar to Plaintiff's claims in *Buckley*[4], Plaintiff Yordy argues that Naylor's statements "in one fell swoop" altered Plaintiffs' status, impacting the way the community viewed Plaintiffs and altering Plaintiffs' chances for successfully seeking redress for their loss under either 730 ILCS 5/5-5-6 (1992) or through a civil court. As shown, *infra*, at pp. 12-14, any rights Plaintiffs had to restitution were extinguished, not by the alleged defamation, but by Naylor's decision to dismiss criminal charges, an act for which he possesses absolute prosecutorial immunity.

For this reason, Plaintiffs' novel and imaginative theory fails to state a known and clearly established constitutional right as of September 1991. Defendant has only found one case regarding statements made to the media about the dismissal of a prosecution: *Marx v. Gumbinner*, 855 F.2d 783, 791 (11th Cir. 1988). However, *Marx* only holds that the prosecutor involved was not entitled to absolute immunity. In fact, the court even admitted that it was not determining whether the

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[4]Buckley argued that the press statements made by State's Attorney Fitzsimmons "aroused the community against him, increasing the chance that the judge would order him imprisoned pending trial and reducing the chance of acquittal at trial." *Buckley*, 20 F.3d at 798.

statements could be the basis for a constitutional violation. *Marx*, 855 F.2d at 791.[5] While courts have held that adverse pretrial statements in a criminal case can state a federal claim, Defendant has not found a case upholding a cause of action for alleged defamatory statements which could have prejudiced a later civil trial. *See Souza v. Pina*, 53 F.3d 423 (1st Cir. 1995) (prosecutor granted qualified immunity for press statement because right was not clearly established). Plaintiffs have not shown, nor can they show, that Naylor should have been aware that his statements violated Plaintiffs' constitutional rights. Moreover, Plaintiffs can claim no clearly protected "right" to restitution. First, as has been argued, *infra*, at pp. 8-9, any "right" to restitution does not vest, if at all, until such time as a criminal conviction is entered. 730 ILCS 5/5-5-6. Second, rendering an order for restitution is not mandatory, but discretionary. *Id.* For these reasons it is clear that Naylor's comments did not alter any clearly established "right" held by Plaintiffs. As a result, the most Plaintiffs lost due to Naylor's alleged defamatory remarks is a hypothetical recovery premised upon the state's ability to convict Pepple and a subsequent judicial determination to order restitution. Plaintiffs' theory is one of first impression. No case law has been cited, nor has Defendant found any, where a defamation claim combined with a possible or contingent status of this nature was found sufficient to constitute the status or right necessary to rise to the

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[5]Plaintiffs cite two other press statement cases which they argue are in direct conflict with the Seventh Circuit's decision: *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989) and *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981). However, both of these cases include rights, other than the defamation, which were clearly constitutionally protected under either the Fourth Amendment or state law. As shown, *infra*, at pp. 5-11, Plaintiffs herein have no similar protected interests. Further in the cases cited by Plaintiffs, the plaintiffs were not injured by the acts for which the prosecutors were entitled to absolute immunity.

level of a constitutional deprivation.

Moreover, in order to prove that Naylor is not entitled to qualified immunity, Plaintiffs must show that a "reasonable official should have known that the available state remedies were inadequate." *Polenz v. Parrott*, 883 F.2d 551, 559 (7th Cir. 1989). *See also Buckley*, 20 F.3d at 798-799 ("[q]uite apart from all questions of immunity, Buckley's claim is doomed unless he can demonstrate that Illinois failed to provide judicial procedures adequate to guard against the effects of pretrial publicity generated by the prosecutor."). Even if *Parratt* and its progeny are inapplicable to Plaintiffs' press conference claim, qualified immunity is still appropriate. Defendant has not found any court that has recognized a due process claim for press statements where the state provided comprehensive procedural safeguards and remedies in a later civil case. Moreover, the only court of appeals besides the Seventh Circuit, which has specifically addressed the contours of publicity and adequate state remedies, has implied that a *Parratt* analysis would be applicable. *Powers v. Coe*, 728 F.2d 97, 105 (2d Cir. 1984). As shown, *infra*, at page 16, given the plethora of procedural safeguards granted a civil litigant in Illinois, Plaintiffs have not and cannot challenge the adequacy of those procedures. Accordingly, Plaintiffs cannot show that Naylor should have known that these state law remedies were inadequate, and Naylor is entitled to qualified immunity.

CONCLUSION

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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October 2, 1995

APPENDIX A - STATUTES INVOLVED

725 ILCS 120/4 (1992):

Victims shall have the following rights:

(6) Upon specific request by the victim, to be notified by the office of the State's Attorney before the office of the State's Attorney makes any offer of a plea bargain to the defendant or enters into negotiations with the defendant concerning a possible plea bargain;

(7) Upon specific request by the victim, to be notified by the Office of the State's Attorney of the ultimate disposition of the cases arising from an indictment or an information, or a petition to have a juvenile adjudicated as a delinquent for any offense defined in Sections 12-13 through 12-16 of the Criminal Code of 1961.

735 ILCS 5/2-1001.5 (1992):

> (a) A change of venue in any civil action may be had when the court determines that any party may not receive a fair trial in the court in which the action is pending because the inhabitants of the county are prejudiced against the party, or his or her attorney, or the adverse party has an under influence over the minds of the inhabitants.

735 ILCS 5/2-1105.1 (1992):

> Each party may challenge jurors for cause. If a prospective juror has a physical impairment, the court shall consider such prospective juror's ability to perceive and appreciate the evidence when considering a challenge for cause.

735 ILCS 5/2-1106 (1992):

> (a) Each side shall be entitled to 5 peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed 3, on account of each additional party on the side having the greatest number of parties. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court.
>
> (b) The court may direct that 1 or 2 jurors in addition to the regular panel be impanelled to serve as alternate jurors. Alternate jurors, in the sequence in

which they are ordered into the jury box, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged at the time the jury retires to consider its verdict. If alternate jurors are called each side shall be allowed one additional peremptory challenge, regardless of the number of alternate jurors called. The additional peremptory challenge may be used only against an alternate juror, but any unexercised peremptory challenges may be used against an alternate juror.

Ill. S.Ct. Rule 234 (1992):

The court shall conduct the *voir dire* examination of prospective jurors by putting to them questions it thinks appropriate touching their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate, or may permit the parties to supplement the examination by such direct inquiry as the court deems proper. Questions shall not directly or indirectly concern matters of law or instructions. The court may acquaint prospective jurors with the general duties and responsibilities of jurors.

Ill. Rules of Professional Conduct, Rule 3.6 (1991):

(a) A lawyer shall not make an extrajudicial

statement the lawyer knows or reasonably should know is likely to be disseminated by public media and, if so disseminated, would pose a serious and imminent threat to the fairness of an adjudicative proceeding.

(b) A statement referred to in Rule 3.6(a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(4) the identity, testimony, or credibility of prospective witnesses;

(c) Notwithstanding Rules 3.6(a) and (b), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(7) in a criminal case:

(A) the identity, residence, occupation, and family status of the accused,

(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person,

(C) the fact, time, and place of arrest, and

(D) the identity of investigating and arresting officers or agencies and the length of the investigation.